Case No. 87-1124

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

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WALTER KENNETH BYRD,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

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## ON WRIT OF CERTIORARI TO THE TWELFTH APPELLATE DISTRICT COURT OF APPEALS, WARREN COUNTY, OHIO

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## BRIEF IN OPPOSITION OF PETITIONER'S WRIT OF CERTIORARI

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## RESPONSE TO PETITIONER'S QUESTIONS PRESENTED FOR REVIEW

1. An appellate court's reversal of a criminal co-defendant's conviction for aggravated drug trafficking does not further require reversal of the remaining criminal defendant's conviction for the same offense where the evidence is not equally applicable to both defendants.

2. A trial court's suppression of some evidence obtained during a seizure does not require suppression of all other evidence obtained by other means.

   A. The Initial Detention and Search.

   B. The Seizure of the Gun and Ammunition Clip from Room 144.

   C. The Search of the Chevrolet.

   D. The Search Warrant.

3. A conviction for Aggravated Trafficking in cocaine based upon circumstantial evidence is proper where that evidence is irreconcilable with any reasonable theory of innocence of the Defendant.

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## STATEMENT OF THE CASE

On 2/14/86, Deputy James Goodall of the Warren County Sheriff's Office, Deerfield Township Unit, was dispatched to the Best Western Motel located on Mason-Montgomery Road in Warren County, Ohio. While enroute, he received a second dispatch that there was a fight in one of the rooms which may involve a weapon. Dep. Goodall proceeded to the hotel under emergency conditions using red light and siren.

Upon arriving at the motel Dep. Goodall was met by the manager who informed him, "It's the people in 143 & 144. There's a fight. There was a woman screaming." He was also informed that a maid had seen a gun in one of the rooms. Dep. Goodall was aware that these particular rooms had been under surveillance by the Warren County Sheriff's Office for approximately one week on an informant's tip for possible drug-related activity. He was further aware the occupants were considered potentially armed and dangerous. As Dep. Goodall proceeded to the area of the two rooms he observed a woman, Vicki Miracle, getting into an automobile parked in front of one of the rooms, preparing to leave. He pulled his cruiser behind the vehicle and asked the female occupant for some identification. While attempting to get identification from the woman in the car, the door of Room 143 opened and the Petitioner appeared, asking the officer what the problem was. Dep. Goodall moved towards the opened door of the motel room, indicated that he was there on a report of some trouble and requested some identification. Petitioner returned to the room (leaving Dep. Goodall by the open door) and began rummaging through a suitcase for identification. As the Petitioner was doing this, Dep. Goodall noticed from the open doorway that there were three, possibly four other individuals in the room. While Dep. Goodall was at the doorway he also observed Petitioner place his hands in the suitcase located on one of the beds. Protruding from the suitcase the deputy observed a leather harness he recognized as being part of a shoulder holster. The

deputy waited for Petitioner to turn away from the suitcase and walk towards the wall at which time Dep. Goodall moved towards the suitcase to secure it and ordered all of the occupants in the room up against the wall. The officer then requested back-up units. Once the back-up units arrived, the occupants were frisked and Mirandized. Dep. Goodall again looked in the suitcase that had contained the shoulder holster and found a silencer and a magazine clip loaded with 9 mm ammunition.

A few moments later William Mueller (another person in the room) came forward and said he knew what the trouble was and that the maid had found the gun in the adjoining room. He voluntarily took Goodall into the adjoining room (#144) and showed him the gun, an Intratec 9 mm semi-automatic pistol, and another clip loaded with 9 mm shells, both of which belonged to Petitioner.

Somewhat later, Petitioner asked Dep. Goodall to allow his seventeen year old son to leave the scene in a blue Chevrolet that Petitioner had rented. Goodall indicated that Petitioner's son might be permitted to leave if Petitioner allowed police to search the car *and* everything was clean. Petitioner then signed a consent form which advised him of his right to refuse consent. Petitioner's son was not permitted to leave, however, because the search of the Chevrolet revealed three glass vials containing a white residue powder which the officers suspected was cocaine.

The officers then obtained a search warrant for the other vehicle (a Cadillac) and both motel rooms. A search of the Cadillac yielded nothing which resulted in a conviction for the Petitioner. The search of the rooms yielded boxes containing clothes and personal items, small amounts of marijuana and a large collection of equipment and paraphernalia commonly used in the preparation of cocaine for distribution and resale. Among the equipment were four vials which contained a mixture of lidocaine, cocaine, and caffeine. Appellant acknowledged ownership of all the equipment and

paraphernalia, including the containers in which the vials were found.

Other facts and discoveries regarding this case will be discussed in the Argument section of this Brief as they become pertainent.

Petitioner was initially charged with two counts of Drug Abuse, R.C. 2925.11(A) for Possession of Marijuana and Cocaine; Aggravated Trafficking in Drugs (cocaine), R.C. 2925.03(A)(2); Carrying a Concealed Weapon, R.C. 2923.12(A); Possession of a Dangerous Ordinance, R.C. 2923.17(A); and Possession of a Counterfeit Controlled Substance, R.C. 2925.37(A). The weapons charges and the counterfeit controlled substance charge were dismissed by the trial court.

On May 19, 1986, appellant filed a Motion to Suppress all of the items seized during the search of the automobiles and motel rooms. The trial court excluded only the items seized during Goodall's search of the suitcase. The court held that the search of the suitcase was not justified out of concern for the officers safety since the occupants of the room were isolated and found to be unarmed. The court held that all other evidence was lawfully obtained and, therefore, admissible.

Petitioner and three co-defendants were all tried together. As to Petitioner, the jury returned verdicts of guilty for Possession of Marijuana, Possession of Cocaine, and Aggravated Trafficking in Cocaine. Petitioner was fined $100.00 on the marijuana charge and sentenced to one year imprisonment for possession of cocaine and two years imprisonment for Aggravated Trafficking, both prison sentences to run consecutively. Petitioner appealed from the Possession of Cocaine and Aggravated Trafficking convictions to the Twelfth Appellate District. The three assignments of error were overruled on June 29, 1987. On November 4, 1987, the Ohio Supreme Court declined jurisdiction of this matter because no substantial constitutional question existed.

## ARGUMENT

### RESPONSE TO FIRST QUESTION PRESENTED FOR REVIEW:

### AN APPELLATE COURT'S REVERSAL OF A CRIMINAL CO-DEFENDANT'S CONVICTION FOR AGGRAVATED DRUG TRAFFICKING DOES NOT FURTHER REQUIRE REVERSAL OF THE REMAINING CRIMINAL DEFENDANT'S CONVICTION FOR THE SAME OFFENSE WHERE THE EVIDENCE IS NOT EQUALLY APPLICABLE TO BOTH DEFENDANTS.

As the Petitioner points out, where a trier of fact uses different facts to convict co-defendants of the same offense and one defendant's conviction is reversed on appeal, a reviewing court is not required to reverse the remaining conviction. *Marcoquisseppe* v. *State* (1926), 114 Ohio St. 229, 151 N.E. 2d 182. A reading of the Twelfth District Court of Appeals decision in *State* v. *Mueller* (War. App. No. 86-08-056), June 1, 1987 amply demonstrates there were different facts used by the jury to convict each of the Aggravating Trafficking charges. See Petitioner's Appendix, Parts D & E.

Specifically, Petitioner was an admitted cocaine addict in the past. He had used the trafficking equipment and it was owned by him. He also possessed cocaine at that same time and location as he did the equipment. None of that evidence applied to Co-defendant Mueller. Mueller was merely present with Petitioner.

The Petitioner asserts that he received discriminatory treatment under the law as compared to another co-defendant (Mueller). There is no question that Petitioner and Mueller are within the same classification for Equal Protection purposes. In this situation, the Equal Protection Clause requires more than mere difference in result. It requires a showing of discriminatory motivation. Petitioner has failed to show or even assert such a motivation.

For the foregoing reasons, Respondent respectfully submits that this Court should decline review of Petitioner's first question presented for review.

## RESPONSE TO SECOND QUESTION PRESENTED FOR REVIEW:

## A TRIAL COURT'S SUPPRESSION OF SOME EVIDENCE OBTAINED DURING A DETAINMENT DOES NOT REQUIRE SUPPRESSION OF ALL OTHER EVIDENCE OBTAINED BY OTHER MEANS.

### A. THE INITIAL DETENTION AND SEARCH.

It is well settled that a police officer may investigate possible criminal behavior even though there is no probable cause at that time to make an arrest. *Terry* v. *Ohio* (1968), 392 U.S. 1, 88 Sup. Ct. 1868. The officer may conduct a reasonable search for weapons during a *Terry* stop when a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. *Terry*, 392 U.S. at 27. Again, probable cause for an arrest is not required.

In this case, Dep. Goodall of the Warren County Sheriff's Office was dispatched to the Best Western Motel located in Warren County on report of a disturbance. While enroute the dispatcher recontacted him and indicated that there was a fight in one of the rooms which may involve a weapon. When Dep. Goodall arrived at the motel, the manager informed him as to where the fight was and that there was a woman screaming. In addition, he was told that a maid had seen a gun in the room earlier. As he approached the motel room, Dep. Goodall recalled from police intelligence reports that there was prior police surveillance of these rooms and their occupants regarding possible drug involvement.

Upon arrival, Dep. Goodall requested identification from Petitioner, an occupant in Room 143, as allowed by *Terry*, *supra*. As Petitioner was rummaging through his suitcase, Dep. Goodall observed through the open doorway a shoulder holster protruding from this suitcase.

Under these facts, it is clear that Dep. Goodall was reasonably warranted in his belief, for a variety of reasons,

that his safety was in danger because he was dealing with an armed individual. These reasons were: (1) the dispatcher had indicated to him that a weapon was in the room, (2) the hotel manager at the scene told him there was a fight going on at the room and, further, that a maid had recently seen a gun in that room, (3) he was aware that police intelligence indicated that persons occupying the room were potentially armed and dangerous,[1] (4) his own observation of the shoulder holster in the open suitcase. Therefore, Dep. Goodall was warranted in his initial detention of the Petitioner and seizure of the holster under *Terry*, *supra*. Three levels of the judiciary have held accordingly.

## B. THE SEIZURE OF THE GUN AND AMMUNITION CLIP FROM ROOM 144.

The trial court did not consider Dep. Goodall's continued search of the suitcase in Room 143 after his back-up units had arrived as legal. The trial court concluded that the suspects and the contents of the bag presented no personal danger or risk to officers at that time. Therefore, the search absent a warrant was illegal and the evidence (a silencer and magazine clip loaded with 9 mm ammunition) obtained from the suitcase was suppressed. See Petitioner's Appendix, Part A, page 6.

The issue then becomes whether the gun (an Intratec 9 mm semi-automatic pistol) and the accompanying ammunition clip obtained subsequently in Room 144 from William Mueller, a co-defendant and occupant of the room, are sufficiently distinguishable from any prior illegality regarding the search of the suitcase to be purged of the primary taint. *Segura* v. *United States* (1984), 468 U.S. 796, 804-805. The

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[1] Officers quite often must rely on many types of police intelligence reports including "be on the look-out" flyers and information from their own dispatchers. *United States* v. *Hensley* (1985), 469 U.S. ____, 105 Sup. Ct. ____, 83 L. Ed. 2d 604.

evidence is not to be excluded unless the illegality was the "but for" cause of the discovery of the evidence. *Segura, supra.*

The facts of this case indicate, and the Twelfth Appellate Court duly noted, that Mueller came forward on his own initiative without any threats or coercive tactics used by the officers. Mueller voluntarily took Dep. Goodall into the next room (#144) and showed him the gun and clip in question (both of which belonged to Petitioner). This occurred *after* everyone was read the *Miranda* rights. None of the officers had drawn a weapon. Mueller testified at the suppression hearing that at the time he came forward, it was his belief that all the accused in the room "were kind of more at ease". Therefore, the Twelfth Appellate Court was correct in holding "that Mueller's production of the gun was an independent act of free will and not the result of police coercion", under the totality of the circumstances.[2]

It should be noted that Petitioner was not convicted of possessing this weapon at trial.

### C. THE SEARCH OF THE CHEVROLET.

After the initial detention, but before the execution of the search warrant, Petitioner asked Dep. Goodall to allow Petitioner's seventeen year old son to leave the scene in a blue Chevrolet rented by Petitioner. Dep. Goodall indicated this might be possible if Petitioner granted police permission to search the car and further that everything was clean. Petitioner then signed a written consent to search form which informed Petitioner of his right to refuse. The search yielded three glass vials containing a white residue powder that later proved to be cocaine.

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[2] See Respondent's Appendix, Part A, for the complete 6/29/87 decision of the Twelfth Appellate District of Ohio. Please note that much of that court's reasoning on this particular issue appears to have been inadvertently omitted by Petitioner.

The Twelfth Appellate District of Ohio most clearly and succinctly analyzed these facts, and concluded the following:

> "The propriety of admitting the evidence seized from the blue Chevrolet turns upon the validity of the consent to search obtained from Appellant. In order to waive his Fourth Amendment privilege against unreasonable searches and seizures, the accused must give a consent which is voluntary under the totality of all the circumstances. *Schneckloth* (1973), 412 U.S. 218; *State* v. *Childress* (1983), 4 Ohio St. 3d 217. Here appellant acknowledged understanding of his *Miranda* rights. He read and signed a consent form in which he was advised of his right to refuse consent. There were no threats or coercive tactics used by the police. Although appellant apparently gave consent with the hope that his son would be released, there was no specific promise or deal made to that effect. Based upon these circumstances, it is evident that appellant knowingly and voluntarily consented to the search of the Chevrolet and that the fruits thereof were therefore admissible at trial." See Petitioner's Appendix, Part E, pages 19 and 20.

**D. THE SEARCH WARRANT.**

The Petitioner contends that the vast amount of drug manufacturing paraphernalia and equipment discovered pursuant to the search warrant secured by Dep. Goodall should be suppressed as the fruit of a prior illegality. Respondent respectfully submits that this evidence came about by means wholly separate, distinguishable, and constitutional from the alleged illegality.

As discussed in Part A of this issue, the initial detention of Petitioner in Room 143 and seizure of the shoulder holster was permissible under *Terry*, *supra*. Three levels of the judiciary have so held.

As discussed in Part B of this issue, the seizure of the 9 mm semi-automatic pistol and accompanying ammunition clip

from Room 144 was permissible as a voluntary, independent act of free will on the part of co-defendant Mueller. Three levels of the judiciary have so held.

As discussed in Part C of this issue, the seizure of the three glass vials containing a residue of cocaine from the Chevrolet rented by Petitioner was permissible pursuant to a free and voluntary consent to search knowingly, voluntarily, and intelligently signed by Petitioner after being advised of his right to refuse (and also after being Mirandized in Room 143). Again, three levels of the judicary have so held.

In addition, the affidavit for the search warrant also contained the other facts listed in the statement of the case section of this brief pertaining to the informant's tip and resulting surveillance, and the hotel's complaint regarding the fight. Also, that pursuant to Dep. Goodall's considerable training and experience as a police officer (including three years as an undercover narcotics officer) he recognized the white powder residue to be cocaine. The affidavit further revealed how this information and evidence was collected. None of the above information is alleged to be falsely represented in the affidavit. The search warrant was then approved by a local, neutral, and detached magistrate and was limited in scope to the two motel rooms and the other vehicle involved (a Cadillac) and only for weapons, drugs, drug manufacturing equipment, and money. The police in good faith reasonably relied on the magistrate's decision. There is no contention by Petitioner that the police improperly executed the warrant.

The only illegality cited by the three lower courts pertains to the search of Petitioner's suitcase in Room 143, which occurred *after* the initial seizure of the shoulder holster. Therefore, only this evidence (a silencer and magazine clip loaded with 9 mm ammunition) was ultimately suppressed by the trial court. However, three levels of the judiciary have held that under the totality of the circumstances, there was a substantial basis for the magistrate's issuance of the search

warrant based on all the information contained therein. *Illinois* v. *Gates* (1983), 462 U.S. 213; *Massachusetts* v. *Upton* (1984), 466 U.S. 727. Clearly, it cannot be argued that none of this evidence could have been discovered but for the seizure of the silencer and clip from the suitcase. *Segura*, *supra*. Finally, the police in good faith reasonably relied on the magistrate's issuance of the warrant. *United States* v. *Leon* (1984), 468 U.S. ____, 104 Sup. Ct. ____, 82 L.Ed. 2d 677.

For the foregoing reasons, Respondent respectfully submits that this Court should decline review of Petitioner's second question presented for review.

**RESPONSE TO THIRD QUESTION PRESENTED FOR REVIEW:**

**A CONVICTION FOR AGGRAVATED TRAFFICKING IN COCIANE BASED UPON CIRCUMSTANTIAL EVIDENCE IS PROPER WHERE THAT EVIDENCE IS IRRECONCILABLE WITH ANY REASONABLE THEORY OF INNOCENCE OF THE DEFENDANT.**

Petitioner in his third question presented for review asserts essentially that his conviction on the charge of Aggravated Trafficking is against the weight of the evidence. The Respondent submits that circumstances surrounding Petitioner's arrest would lead the trier of fact to only one conclusion: that he was involved in the preparation or distribution of cocaine for sale.

The Twelfth District Court of Appeals most clearly and completely stated the facts that supported the Aggravated Trafficking conviction:

> "Appellant (Petitioner) traveled from New Orleans, to Atlanta, where he met Mueller. The two traveled to the Butler County-Warren County area where they met Miracle and Klontz. The group stayed at four different motels along I-71 before finally settling in at the Best Western. A desk clerk who worked at one of the other motels testified that Mueller became upset when she informed him that his rooms would no longer be available. She also remembered appellant paying the rent on a daily basis in cash, using fifty and one hundred dollar bills.
>
> "The record further reflects that Mueller rented the rooms at the Best Western and paid for each day's stay in cash. Curiously, Mueller requested that the rooms receive no cleaning service, and the rooms went uncleaned for almost an entire week before the manager insisted that the maids be permitted to clean the rooms for obvious health reasons. The maids testified that appellant and his party remained in room 143 while it was

cleaned. When the maids went next door to clean room 144, they discovered the handgun which led to the arrest of appellant and the others.

"Three desk clerks at the Best Western also testified as to the number of telephone calls which the group received. The clerk working at 7:00 a.m. to 3:00 p.m. shift testified that room 143 received about ten telephone calls per day. The clerk working the shift from 3:00 p.m. to 11:00 p.m. testified that between January 11 and 14, room 143 received numerous calls, so many that at times the clerk could not leave the switchboard. Finally, the clerk who worked the 11:00 p.m. to 7:00 a.m. shift testified that on Friday and Saturday, January 10 and 11, room 143 received approximately twelve calls per hour each night. Appellant and his companions claimed that they only received about a dozen calls the entire time they were registered at the Best Western. When asked about the calls, appellant suggested that it was the holiday season and that he and his party had numerous relatives and friends who lived in the area. The clerks testified, however, that the callers left no messages when room 143 did not answer.

"Goodall identified the various drug equipment and paraphernalia seized in room 143. Goodall described each item and its particular use of significance. A non-exhaustive inventory of the items found included the following:

> 1 block of Mannitol (a cutting agent used to increase cocaine bulk),
>
> 2 bottles labeled "chemist 100% petroleum ether" (an item used for free-basing cocaine),
>
> 1 item labeled "Technician's Chemical Manufacturing Inositol" (an item often offered for sale as cocaine since it closely resembles actual cocaine),
>
> 1 Plastic container labeled "Show-Dry" (an item used to remove moisture from bulk compounds),

1 "Drying Chamber" (an item used for preparing bulk materials from which the moisture was removed),

2 Deering precision miniature scales,

1 Deering weighing tray for use on the miniature scales,

1 Deering funnel,

1 Canister containing a white crystalline powder substance,

2 Glass vials covered with a valve instrument known as a "dial-a-toot" (an item used to administer individual dosages of cocaine),

1 Glass container labeled "Superior Inositol by Pacific Laboratories in Cal." containing a white crystalline powder substance,

1 Plastic baggie containing an off-white powder substance,

1 Blue plastic container containing a large lump of a white cyrstalline powder substance,

1 Leather kit containing a mirror (a mirror was commonly used to hold cocaine while it was either cut with a razor blade or snorted through the nostrils),

1 Paper bag from a West Carrollton, Ohio, establishment known as "Philman's" containing numerous glass vials with plastic screw-on lids (Philman's was identified as a commercial retail establishment specializing in the sale of drug paraphernalia),

4 Soda straws approximately two to three inches in length (used for snorting cocaine),

1 Burnt measuring or weighing device,

1 Small metal bowl,

2 Complete Deering grinder kits with grinders, screen housings and catch dishes (commonly used to ground cocaine into fine powder suitable for snorting),

1 Catch dish,

1 Screen housing,

1 Rough wire screen,

1 Metallic pan with a considerable quantity of white crystalline powder substance,

1 Felt or velvet-lined custom designed case containing a mirror, screen, tray, a glass vial in a silver canister, a funnel which fits on the vial, a miniature scale and counterweights, a base and stand for the scales, a pair of tweezers, and a plastic canister of smaller counterweight,

1 Velvet-lined wooden case with a sliding tray containing a scale similar to the one in the unit above only larger and sturdier, a canister with heavier counterweights, and a pair of tweezers, 20-25 glass vials."

See Petitioner's Appendix, Part E, pages 32-39.

The Petitioner voluntarily admitted ownership of these items, claiming he had acquired them from an earlier period when he was a cocaine addict. The record contains detailed descriptions of how these items were necessary to cut, grind, sift, dry, increase bulk amount, weigh and package cocaine. Items such as these are very commonly used to prepare cocaine for shipment or distribution when it is intended for sale or resale. See Sec. 2925.03(A)(2) O.R.C. Any claim that this property was merely for personal use is clearly ludicrous. This is especially convincing considering the shear volume of materials and that they were gathered together in the hotel

room by the Petitioner. Even in his defense, Petitioner admitted it was his desire to keep the above listed items. In addition, cocaine was actually found in four of the vials, and the Defendant-Appellant was convicted of possessing that substance.

Clearly, the evidence went well beyond the Petitioner's simultaneous possession of these drug trafficking items and the cocaine. There was much testimony regarding Petitioner's actions and the circumstances surrounding his possession of said items.

This evidence is to be considered against the Petitioner's theory of innocence. That theory begins with his claim that he changed motels for various legitimate reasons, including lack of vacancy and a search for cheaper rates. The only evidence presented here was his own assertions, as well as those of partners and girlfriends. No evidence came from sources connected to the hotels themselves. The phone calls were explained by bald assertions that they were messages from the many alleged friends and relatives in the area. However, the calls were extremely voluminous, made at odd hours, and the callers did not leave names or messages when no one answered in the rooms. Further, none of these friends or relatives testified at the trial.

In this same spirit, Petitioner submitted that the vast amount of drug trafficking equipment recovered was only in his actual possession for one day or less. Further, that despite their admitted suitability for use in drug trafficking, he was not using this "miniature laboratory" for the preparation or distribution of cocaine, such as the type he was convicted of possessing at the same scene.

The jury simply decided, after weighing all the evidence and considering the credibility of each witness, that the Petitioner had not presented a reasonable theory of innocence. Further, the jury obviously did not come up with any alternative reasonable theory of innocence not forwarded by the

Petitioner, *State* v. *Kulig* (1974), 37 Ohio St. 2d 157; *State* v. *Ebright* (1983), 11 Ohio App. 3d 97.

The Respondent submits that Petitioner is not claiming that any lower court has applied the wrong law or that a law relied upon is unconstitutional. Petitioner merely disagrees with the decision made based upon the testimony presented — a decision upon which three lower courts agree.

For the foregoing reasons, Respondent respectfully submits that this Court should decline review of Petitioner's third question presented for review.

## CONCLUSION

The Respondent respectfully submits that the thrust of Petitioner's argument is not that the state courts of Ohio have applied law on a federal question in a way that is in conflict with other state or federal courts or this Court. Nor does Petitioner submit that the questions here presented have not been previously settled by this Court. Rather, Petitioner's main argument is that he disagrees with the conclusions of law by the lower courts based on the facts presented at the trial court level — legal conclusions Respondent submits were made pursuant to application of the correct law. In essence, Petitioner submits that the decisions of the lower courts were against the manifest weight of the evidence.

For the above reasons, Respondent respectfully requests this Court to decline review in this matter.

Respectfully Submitted,

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**PROOF OF SERVICE**

I hereby certify that I have this ____ day of February, 1988 mailed three (3) copies of the within Brief in Opposition to James D. Ruppert, 1063 East Second Street, P.O. Box 369, Franklin, Ohio 45005, by ordinary U.S. mail.

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## APPENDIX

Case No. CA86-08-057

In The Court of Appeals
Twelfth Appellate District of Ohio
Warren County

STATE OF OHIO,
Plaintiff-Appellee,

vs.

WALTER KENNETH BYRD,
Defendant-Appellant.

**MEMORANDUM DECISION AND JUDGMENT ENTRY**
(Filed June 29, 1987)

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PER CURIAM. This cause came on to be heard upon an appeal, transcript of the docket, journal entries and original papers from the Court of Common Pleas of Warren County, the transcript of proceedings, and the briefs and oral arguments of counsel.

Now, therefore, the assignments of error having been fully considered, are passed upon in conformity with App. R. 12(A) as follows:

On January 14, 1986, Deputy James Goodall of the Warren

County Sheriff's Department was dispatched to the Best Western Motel located on Mason-Montgomery Road in Warren County, Ohio. Upon arriving, he was informed by the motel manager that there was a disturbance in rooms 143 and 144 and that a maid had found a gun in one of the rooms. These particular rooms had been under surveillance by the Warren County Sheriff's Department for approximately one week for possible drug-related activity. The surveillance, however, had not produced any evidence of wrongdoing.

Goodall approached the rooms and noticed Vickie Miracle preparing to leave in a Cadillac. He stopped his cruiser directly behind the Cadillac, blocking its exit, and asked Miracle for some identification. About that time, defendant-appellant, Walter Kenneth Byrd, stepped out of room 143 and asked what the problem was. Goodall indicated that there was a report of some trouble and requested identification from appellant. Appellant returned to the room and began looking through a suitcase for identification. Standing in the doorway, Goodall noticed a leather shoulder holster in the suitcase. He moved forward, seized the holster, and ordered all of the occupants of the room against the wall. The occupants included appellant, appellant's minor son Ken, William Mark Mueller, Mueller's girlfriend Gwendolyn Clontz, and Miracle, who had returned to the room. As soon as backup officers arrived, the occupants were frisked and advised of their *Miranda* rights. Goodall then searched through the suitcase and discovered what appeared to be a silencer and a magazine clip containing 9mm ammunition. A few moments later, Mueller came forward and said he knew what the trouble was and that a maid had found a gun in the adjoining room. He took Goodall into the adjoining room and showed him the gun, an Intratec 9mm semi-automatic pistol, and another clip loaded with 9mm shells, both of which belonged to appellant.

Appellant expressed concern about his minor son's presence and discussed with Goodall the possibility of letting his son leave in a blue Chevrolet that appellant had rented. Goodall indicated that appellant's son might be permitted to leave if

he allowed them to search the car and everything was clean. Appellant then signed a consent form which advised him of his right to refuse consent. Appellant's son was not permitted to leave, however, because the search of the Chevrolet revealed three glass vials containing a white residue power which the officers suspected was cocaine.

The officers then obtained a search warrant for the Cadillac and both motel rooms. A search of the Cadillac yielded a purse which contained a bottle of black capsules resembling an amphetamine. The purse was later identified as belonging to Miracle. The search of the room yielded numerous boxes containing clothes and personal items, small amounts of marijuana, and numerous pieces of equipment and paraphernalia commonly used in the preparation of cocaine. Among the equipment were four vials which contained a mixture of lidocaine, cocaine, and caffeine. Appellant acknowledged ownership of all the equipment and paraphernalia, including the containers in which the vials were found.

Appellant was initially charged with two counts of drug abuse, R.C. 2925.11(A), possession of marijuana and cocaine; aggravated trafficking in drugs, R.C. 2925.03(A)(2), cocaine; carrying a concealed weapon, R.C. 2923.12(A); possession of a dangerous ordnance, R.C. 2923.17(A); and possession of a counterfeit controlled substance, R.C. 2925.37(A). The weapons charges and the counterfeit controlled substance charge were dismissed by the trial court.

On May 19, 1986 appellant filed a motion to suppress all of the items seized during the search of the automobiles and motel rooms. The trial court excluded only the items seized during Goodall's search of the suitcase. The court held that the search of the suitcase was not justified out of concern for the officers' safety since the occupants of the room were isolated and found to be unarmed. The court held that all other evidence was lawfully obtained and, therefore, was admissible.

Appellant, Mueller, Miracle and Klontz were all tried together. A jury returned verdicts of guilty against appellant for possession of marijuana, possession of cocaine, and ag-

gravated trafficking in cocaine. Appellant was fined $100 on the marijuana charge and sentenced to one year imprisonment for possession of cocaine and two years imprisonment for aggravated trafficking, both prison sentences to run consecutively. Appellant appeals from the possession of cocaine and aggravated trafficking convictions and sets forth three assignments of error for our review.

FIRST ASSIGNMENT OF ERROR:

"The trial court erred in denying defendant's motion to suppress evidence."

SECOND ASSIGNMENT OF ERROR:

"The trial court erred in convicting defendant of drug abuse."

THIRD ASSIGNMENT OF ERROR:

"The trial court erred in convicting defendant of aggravated trafficking."

Appellant's first assignment of error concerns the trial court's denial of his motion to suppress evidence. Appellant contends that his arrest and the subsequent searches of the automobiles and rooms were unlawful and, therefore, all evidence obtained thereby should have been excluded.

It is well settled that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *Terry* v. *Ohio* (1968), 392 U.S. 1, 22. When an officer makes such an investigative "stop," he is permitted to conduct a reasonable search for weapons when he has reason to believe that he is dealing with an armed and dangerous individual. *Id.* at 24. Such a search, however, "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Id.* at 26.

Here, Goodall responded to a report of a fight in which a weapon may be involved. Upon arriving at the scene he re-

quested identification from the occupants of the room. As appellant was rummaging through a suitcase looking for identification, Goodall noticed a shoulder holster in a pocket of the suitcase. Under these circumstances, it was reasonable for Goodall to believe that he was dealing with one or more armed individuals. Therefore, the initial detention, seizure of the holster, and pat-down search for weapons was permissible under the parameters of *Terry, supra.*

Once the occupants of the room were isolated, however, and the pat-down search indicated that they were unarmed, the exigency justifying the seizure and search for weapons had passed. There was no longer any threat to the officers' safety. Therefore, any further detention or search, absent probable cause, was unlawful. See *U.S.* v. *Place* (1983), 462 U.S. 696. Thus the trial court correctly excluded the items seized during the search of the suitcase.

The continued detention of the defendants in the room went beyond the scope of a permissible *Terry* stop and rose to the level of an arrest. *State* v. *Maurer* (1984), 15 Ohio St. 3d 239. "It is axiomatic that to effect an arrest the arresting officer must have probable cause both to believe that a crime has been committed and that the one apprehended in fact committed the crime." *State* v. *Massey* (1975), 49 Ohio App. 2d 272, 273. This requires "that the arresting officer, at the moment of arrest, have sufficient information, based on the facts and circumstances within his knowledge or derived from a reasonably trustworthy source, to warrant a prudent man in believing that an offense had been committed by the accused." *State* v. *Ingram* (1984), 20 Ohio App. 3d 55, 57.

Goodall testified at the suppression hearing that, at the time he ordered the defendants against the wall, he had no evidence that any crime had occurred. He further stated that after finding the "silencer" in the suitcase, he decided to place the defendants under arrest for possession of a dangerous ordnance, even though he could not specifically determine who possessed it. When asked why he continued to detain the defendants, Goodall stated, "I could not determine ownership of the dangerous ordnance — who it belonged to, or who

knew about it, or who could be a witness to it." Notwithstanding the fact that the object which Goodall considered to be a dangerous ordnance was obtained pursuant to an illegal search, it is clear that there was no probable cause to arrest any of the suspects since there was no evidence linking any one of them to the alleged dangerous ordnance.

We agree with appellant that the arrest was not supported by probable cause. The question remains, however, as to the effect of the unlawful arrest on the evidence subsequently obtained. Appellant claims that the unlawful arrest tainted all subsequent evidence and therefore such evidence should have been excluded.

The question to be resolved when it is claimed that evidence subsequently obtained is "tainted" or is a "fruit" of a prior illegality is whether the challenged evidence was "come at by exploitation of the initial illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Segura* v. *United States* (1984), 468 U.S. 796, 804, 805, (quoting *Wong Sun* v. *United States* [1963], 371 U.S. 471, 484.) The "evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint.' " *Segura*, *supra*, (quoting *Nardone* v. *United States* [1939], 308 U.S. 338, 341). In other words, the evidence is not to be excluded unless the illegality was the "but for" cause of the discovery of the evidence. *Segura*, *supra*.

For purposes of analysis, the evidence which appellant claims should have been suppressed can be divided into three distinct groups: (1) the gun and ammunition clip given to Goodall by Mueller; (2) all items seized from the blue Chevrolet pursuant to the consent given by appellant, and (3) all items seized from the Cadillac and motel rooms pursuant to the search warrant. Our review of the record convinces us that all the evidence in each of these groups was "come at by means sufficiently distinguishable" to purge the taint of the unlawful arrest.

At the suppression hearing, Mueller testified that after being patted down and after being read the *Miranda* rights, all

of the accused "were kind of more at ease," even though none of them were free to leave. None of the officers had drawn a weapon and there was no evidence of any threats or coercive tactics used by the officers. Mueller came forward on his own initiative, took Goodall into the adjoining room and produced the gun and ammunition clip, which belonged to appellant. There are no allegations that Mueller's actions were anything but voluntary. Under the totality of the circumstances, we hold as did the trial court, that Mueller's production of the gun was an independent act of free will and not the result of any police coercion. See *Schneckloth* v. *Bustamonte* (1973), 412 U.S. 218. Therefore, we are unable to conclude that the gun and ammunition clip were "come at by exploitation of the initial illegality." *Segura*, *supra*, 804. Accordingly, there was no error in the admission of the gun and ammunition clip.

The propriety of admitting the evidence seized from the blue Chevrolet turns upon the validity of the consent to search obtained from appellant. In order to waive his Fourth Amendment privilege against unreasonable searches and seizures, the accused must give a consent which is voluntary under the totality of all the circumstances. *Schneckloth*, *supra*; *State* v. *Childress* (1983), 4 Ohio St. 3d 217. Here appellant acknowledged understanding of his *Miranda* rights. He read and signed a consent form in which he was advised of his right to refuse consent. There were no threats or coercive tactics used by the police. Although appellant apparently gave consent with the hope that his son would be released, there was no specific promise or deal made to that effect. Based upon these circumstances, it is evident that appellant knowingly and voluntarily consented to the search of the Chevrolet and that the fruits thereof were therefore admissible at trial.

Appellant further contends that the evidence seized from the Cadillac and the motel rooms should have been suppressed because the search warrant was not supported by probable cause. In making a probable cause determination, "[t]he task of the issuing magistrate is simply to make a prac-

tical, common sense decision whether, given all the circumstances set forth in the affidavit before him, * * * there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates* (1983), 462 U.S. 213, 238. In reviewing the magistrate's decision, an appellate court is not to conduct a *de novo* probable cause hearing. *Id.* The duty of a reviewing court is to "merely [decide] whether the evidence viewed as a whole provided a 'substantial basis' for the magistrate's finding of probable cause." *Massachusetts* v. *Upton* (1984), 466 U.S. 727, 732, 733; *Gates*, *supra*. Such a deferential standard of review is appropriate in order to effectuate the Fourth Amendment's strong preference for warrants and to encourage use of the warrant process by police officers. *Upton*, *supra*.

A review of the facts contained in the search warrant and supporting affidavit leads us to conclude that there was a substantial basis to support the issuing judge's finding of probable cause. Although some of the facts viewed independently may not support such a determination, we are confident that when the facts are viewed as a whole, the issuing judge could properly determine that there was a "fair probability" that contraband or evidence of a crime could be found in the Cadillac and motel rooms. Therefore, we find that the warrant was valid and the evidence seized during the subsequent search was admissible.

Although we find that the prolonged detention of appellant and the others constituted an unlawful arrest, we are unable to conclude that this illegality tainted all subsequent evidence. The connection between the unlawful arrest and the discovery and seizure of the evidence was "so attenuated as to dissipate the taint." *Segura*, *supra*, 805. Therefore, appellant's first assignment of error is overruled.

In his second assignment of error, appellant claims the trial court erred in convicting him of drug abuse for possession of cocaine, R.C. 2925.11(A). That statute states that: "[n]o person shall knowingly obtain, possess or use a controlled substance." Appellant contends that the state failed to meet its burden of proof on the element of possession.

"Possession" is defined in R.C. 2925.01(L) as "having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing is found." It is clear, therefore, that appellant could not be convicted upon a mere showing that he occupied the motel room in which the cocaine was found and we agree with those cases cited by appellant to that effect.[1] Most of the cases cited by appellant, however, are easily distinguishable. In all but *Pruitt*, the possession convictions were reversed because the only evidence connecting the defendants to the substances was occupation or access to the areas in which the substances were found. In *Pruitt*, the conviction was upheld because the evidence went far beyond a mere showing of occupation or access. There the illegal substance was found on the floor in the bathroom, less than a foot from the defendant, in a syringe "ready for use." *Pruitt*, *supra*, at 158.

Here, as in *Pruitt*, the evidence goes far beyond a mere showing of occupation or access. The cocaine was contained in four glass vials. The vials were found inside the screen housing of a grinder kit commonly used to sift cocaine. Appellant testified that the grinder kit and several other pieces of equipment and paraphernalia that were found together in a drawer belonged to him. Appellant also admitted that he had used these items to prepare cocaine for his personal use. We hold that these facts constitute substantial evidence by which the jury could reasonably conclude that appellant knowingly possessed the cocaine. *State* v. *Eley* (1978), 56 Ohio St. 2d 169. Accordingly, appellant's second assignment of error is overruled.

For his third assignment of error, appellant asserts that he should not have been convicted of aggravated trafficking. Appellant essentially argues that his conviction was against the manifest weight of the evidence. When considering an assign-

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[1] Appellant relies on *State* v. *Haynes* (1971), 25 Ohio St. 2d 264; *State* v. *Stirsman* (1974), 67 Ohio Ops. 2d 48; *Cincinnati* v. *McCartney* (1971), 30 Ohio App. 2d 45; and *State* v. *Pruitt* (1984), 18 Ohio App. 3d 50.

ment of error of this nature, it is well established that a reviewing court will not reverse the jury's verdict where there is substantial evidence upon which a jury could reasonably conclude that all elements of the charged offense have been proven beyond a reasonably doubt. *Eley, supra.* Naturally, the state bears the burden of proving each element of the charged offense beyond a reasonable doubt. If the state relies upon circumstantial evidence to prove an essential element of the offense, such evidence must be irreconcilable with any reasonable theory of the accused's innocence in order to support a finding of guilt. *State* v. *Kulig* (1974), 37 Ohio St. 2d 157; *State* v. *Italiano* (1985), 18 Ohio St. 3d 38, certiorari denied (1985), ____ U.S. ____, 106 S.Ct. 234. If the circumstantial evidence is reconcilable and consistent with any reasonable theory of an accused's innocence, the accused cannot be found guilty because there is reasonable doubt as to his guilt. *Kulig, supra.*

Appellant was convicted of aggravated trafficking in cocaine in violation of R.C. 2925.03(A)(2), which states that: "[n]o person shall knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another."

Obviously, there was little, if any, direct evidence that appellant was preparing cocaine for shipment or distribution or actually distributing cocaine, knowing or having reasonable cause to believe such was intended for sale or resale by himself or another. The state had to rely upon circumstantial evidence to support this particular conviction. There was, however, direct evidence in the record which supported the state's position regarding this offense.

Appellant traveled from New Orleans, to Atlanta, where he met Mueller. The two traveled to the Butler County-Warren County area where they met Miracle and Klontz. The group stayed at four different motels along I-71 before finally settling in at the Best Western. A desk clerk who

worked at one of the other motels testified that Mueller became upset when she informed him that his rooms would no longer be available. She also remembered appellant paying the rent on a daily basis in cash, using fifty and one hundred dollar bills.

The record further reflects that Mueller rented the rooms at the Best Western and paid for each day's stay in cash. Curiously, Mueller requested that the rooms receive no cleaning service, and the rooms went uncleaned for almost an entire week before the manager insisted that the maids be permitted to clean the rooms for obvious health reasons. The maids testified that appellant and his party remained in room 143 while it was cleaned. When the maids went next door to clean room 144, they discovered the handgun which led to the arrest of the appellant and the others.

Three desk clerks at the Best Western also testified as to the number of telephone calls which the group received. The clerk working the 7:00 a.m. to 3:00 p.m. shift testified that room 143 received about ten telephone calls per day. The clerk working the shift from 3:00 p.m. to 11:00 p.m. testified that between January 11 and 14, room 143 received numerous calls, so many that at times the clerk could not leave the switchboard. Finally, the clerk who worked the 11:00 p.m. to 7:00 a.m. shift testified that on Friday and Saturday, January 10 and 11, room 143 received approximately twelve calls per hour each night. Appellant and his companions claimed that they only received about a dozen calls the entire time they were registered at the Best Western. When asked about the calls, appellant suggested that it was the holiday season and that he and his party had numerous relatives and friends who lived in the area. The clerks testified, however, that the callers left no messages when room 143 did not answer.

Goodall identified the various drug equipment and paraphernalia seized in room 143. Goodall described each item and its particular use or significance. A non-exhaustive inventory of the items found included the following:

1 Block of Mannitol (a cutting agent used to increase cocaine bulk),

2 Bottles labeled "chemist 100% petroleum ether" (an item used for free-basing cocaine),

1 Item labeled "Technician's Chemical Manufacturing Inositol" (an item often offered for sale as cocaine since it closely resembles actual cocaine),

1 Plastic container labeled "Show-Dry" (an item used to remove moisture from bulk compounds),

1 "Drying Chamber" (an item used for preparing bulk materials from which the moisture was removed),

2 Deering Precision miniature scales,

1 Deering weighing tray for use on the miniature scales,

1 Deering funnel,

1 Canister containing a white crystalline powder substance,

2 Glass vials covered with a valve instrument known as a "dial-a-toot" (an item used to administer individual dosages of cocaine),

1 Glass container labeled "Superior Inositol by Pacific Laboratories in Cal." containing a white crystalline powder substance,

1 Plastic baggie containing an off-white powder substance,

1 Blue plastic container containing a large lump of a white crystalline powder substance,

1 Leather kit containing a mirror (a mirror was commonly used to hold cocaine while it was either cut with a razor blade or snorted through the nostrils),

1 Paper bag from a West Carrollton, Ohio, establishment known as "Philman's" containing numerous glass vials with plastic screw-on lids (Philman's was identified as a commercial retail establishment specializing in the sale of drug paraphernalia),

4 Soda straws approximately two to three inches in length (used for snorting cocaine),

1 Burnt measuring or weighing device,

1 Small metal bowl,

2 Complete Deering grinder kits with grinders, screen housings and catch dishes (commonly used to ground cocaine into fine powder suitable for snorting),

1 Catch dish,

1 Screen housing,

1 Rough wire screen,

1 Metallic pan with a considerable quantity of white crystalline powder substance,

1 Felt or velvet-lined custom designed case containing a mirror, screen, tray, a glass vial in a silver canister, a funnel which fits on the vial, a miniature scale and counterweights, a base and stand for the scales, a pair of tweezers, and a plastic canister of smaller counterweights,

1 Velvet-lined wooden case with a sliding tray containing a scale similar to the one in the unit above only larger and sturdier, a canister with heavier counterweights, and a pair of tweezers, 20-25 Glass vials.

This constitutes most of the items found in room 143, all of which appellant claimed as his own from an earlier time when he was a cocaine addict. Appellant further testified that the equipment was not at the Best Western until the night before he and his companions were arrested. According to appellant, the equipment, along with other personal property, was in the room to be divided up between himself and Miracle.

In *State* v. *Tedrick* (Nov. 13, 1984), Clermont App. No. CA84-01-003, unreported, we stated that when a defendant offers any theory of innocence whatsoever, even if reasonable, *Kulig* does not require that the defendants be discharged *ipso*

*facto*. Rather, *Kulig* stands for the proposition that there are cases when the circumstantial evidence relied upon for a conviction is so attenuated that reasonable minds could never find that the desired fact or essential element had been established beyond a reasonable doubt. Whether a theory of innocence is reasonable must be determined in view of the weight and credibility that the finder of fact gives to the evidence and, if the trier of fact determines that the connection between what is proved and what is sought to be proved is strong enough to support a finding of proof beyond a reasonable doubt, the circumstantial evidence is sufficient. *Id.*

Thus, the general principle that a reasonable theory of innocence will prevent a conviction based upon circumstantial evidence is subject to two important qualifications. First, the determination of the reasonableness of a theory of innocence is a prerogative of the trier of fact — in this case, the jury. *State* v. *Marsh* (May 20, 1985), Butler App. No. CA84-09-108, unreported; *State* v. *Cousin* (1982), 5 Ohio App. 3d 32. Second, in order for an alternative theory of innocence to preclude a conviction on circumstantial evidence, the asserted alternative theory must be reasonable and must be based upon testimony which is not subject to rejection on credibility grounds. *Id.*

Appellant's theory of innocence is that the equipment was his own, the unused relics from his past when he was a cocaine addict. It is strange, however, that one who has allegedly defeated such a habit would retain the instruments of his addiction, especially such a sizable cache. Furthermore, the manner in which appellant and his companions furtively drifted from one motel to another and the clandestine character of their activities do not support appellant's claim of a holiday visit. The numerous phone calls — most of which occurred during the nocturnal hours — do not coincide with appellant's theory, especially when so many of these callers, alleged friends or relatives, would not leave names or messages when appellant and his companions were unavailable. Certainly, the mere possession of the equipment,

standing alone, is insufficient to support the trafficking conviction. However, proof beyond a reasonable doubt within the context of a *Kulig* argument does not require the state's circumstantial evidence to prove the charged offense beyond all doubt. See, *State* v. *Baltrusch* (Apr. 14, 1986), Clermont App. No. CA85-09-066, unreported. A theory of innocence must be reasonable, as opposed to merely possible. *State* v. *Ebright* (1983), 11 Ohio App. 3d 97; *Tedrick*, *supra*.

Although there was no direct evidence that appellant was actually using the equipment to prepare a substance for shipment or distribution and that appellant knew or had reason to believe that the prepared substance was intended for resale, appellant's secretive conduct and the record as a whole, support the state's position that appellant and the others were using the motel rooms for illegal purposes. The jury heard and listened to the witnesses, made decisions regarding matters of credibility, weighed the evidence and determined the reasonableness of appellant's theory, obviously finding such theory to be unreasonable. We will not substitute our determination for that of the jury and accordingly find no merit in this assignment of error. The third assignment of error is therefore overruled.

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Court of Common Pleas of Warren County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

JONES and HENDRICKSON, JJ., concur.

KOEHLER, P.J., dissents.

KOEHLER, P.J., dissenting. The burden of proving the essential elements of the offense beyond a reasonable doubt is on the prosecution. R.C. 2901.05(A). It the prosecution relies upon circumstantial evidence to prove an element of the offense, such evidence must be irreconcilable with any reasonably theory of an accused's innocence in order to support a finding of guilt. *State* v. *Kulig* (1974), 37 Ohio St. 2d 157. If the circumstantial evidence is reconcilable and consistent with any reasonable theory of an accused's innocence, the accused cannot be found guilty because there is reasonable doubt as to his guilt. *Id.*

Here appellant was convicted of aggravated trafficking in cocaine pursuant to R.C. 2925.03(A)(2), which states, "no person shall knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another."

The state asserts that there is substantial evidence by which the jury could conclude that appellant prepared cocaine for distribution and knew or had reasonable cause to believe that the cocaine was intended for resale. The state further asserts that this evidence is irreconcilable with any theory of innocence. I must disagree with both propositions.

Appellant acknowledged ownership of the equipment and paraphernalia found in his motel room. He indicated that the equipment had been in storage for several months and had been brought to the room only the night before the arrest so that Miracle could separate her belongings. Appellant admitted that he was once addicted and had used the equipment to prepare cocaine for his personal use, but had not done so for several months prior to the arrest. The testimony of the state's expert witness also suggests that this equipment had not been used to prepare any substances around the dates listed in the indictment.

All of the foregoing testimony is reconcilable and consistent

with the reasonable theory of innocence that appellant, a former addict, took numerous items out of storage, including some drug paraphernalia, and brought them to his motel room so that his ex-girlfriend could separate her belongings. Although there is some evidence that appellant may have used the equipment in the past to prepare cocaine for his personal use, there was nothing to suggest that he had prepared cocaine for shipment or distribution, an essential element of the crime for which he was charged. Mere possession of equipment commonly used in the preparation of a controlled substance is insufficient to sustain a conviction for aggravated trafficking. There must be evidence that the accused actually used the equipment to prepare a substance for shipment or distribution and that the accused knew or had reason to believe that the prepared substance was intended for resale. Here, there was no such evidence presented by the state. Accordingly, it is my belief that appellant's third assignment of error is well-taken.

The majority has abrogated the principle of *Kulig* and, by requiring a defendant to present and prove by credible evidence a reasonable theory of innocence, has enhanced circumstantial evidence and the inferences therefrom to an impermissible degree. In this cause, the presumption of innocence has been eroded and the state has been relieved of the burden of proof beyond a reasonable doubt.

Accordingly, I dissent.